

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHELE LEONARD,)	No. CV 06-5513 (CW)
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social Security)	
Administration,)	
)	
Defendant.)	
)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner's denial of disability benefits. As discussed below, the court finds that the Commissioner's decision should be reversed and this matter remanded for further proceedings.

I. BACKGROUND

Plaintiff Michele Leonard was born on January 25, 1951, and was fifty-five years old at the time of her administrative hearing. [Administrative Record, "AR," 50, 231.] She has two years of college education and past relevant work experience as an administrative

1 assistant. [AR 22, 112.] Plaintiff alleges disability on the basis of
2 depression and residual effects of a cerebrovascular accident
3 (stroke). [AR 15.]

4 **II. PROCEEDINGS IN THIS COURT**

5 Plaintiff's complaint was lodged on August 31, 2006, and filed on
6 September 5, 2006. On March 5, 2007, defendant filed an answer and
7 plaintiff's Administrative Record ("AR"). On June 22, 2007, the
8 parties filed their Joint Stipulation ("JS") identifying matters not
9 in dispute, issues in dispute, the positions of the parties, and the
10 relief sought by each party. This matter has been taken under
11 submission without oral argument.

12 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

13 Plaintiff applied for disability insurance benefits ("DIB") under
14 Title II of the Social Security Act on February 9, 2005, alleging
15 disability since October 1, 2003. [JS 2, AR 50.] After the
16 application was denied initially and upon reconsideration, plaintiff
17 requested an administrative hearing, which was held on February 21,
18 2006, before Administrative Law Judge ("ALJ") Alexander Weir III. [AR
19 231.] Plaintiff appeared without counsel¹, and testimony was taken
20 from plaintiff and vocational expert Sandra Schneider. [Id.] The ALJ
21 denied benefits in an administrative decision dated March 7, 2006.
22 [AR 24.] When the Appeals Council denied review on June 2, 2006, the
23 ALJ's decision became the Commissioner's final decision. [AR 6.]

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25
26 ¹ The ALJ advised plaintiff of her right to representation and
27 gave plaintiff an opportunity to postpone the hearing in order to
28 obtain an attorney. [AR 234-35.] Plaintiff stated that she wished to
proceed with the hearing without an attorney but that she may retain
one at a subsequent date. [AR 235.]

IV. STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The Commissioner's (or ALJ's) findings and decision should be upheld if they are free of legal error and supported by substantial evidence. However, if the court determines that a finding is based on legal error or is not supported by substantial evidence in the record, the court may reject the finding and set aside the decision to deny benefits. See Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, a court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Id. "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

V. DISCUSSION

A. THE FIVE-STEP EVALUATION

To be eligible for disability benefits a claimant must demonstrate a medically determinable impairment which prevents the

1 claimant from engaging in substantial gainful activity and which is
2 expected to result in death or to last for a continuous period of at
3 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
4 721; 42 U.S.C. § 423(d)(1)(A).

5 Disability claims are evaluated using a five-step test:

6 Step one: Is the claimant engaging in substantial
7 gainful activity? If so, the claimant is found not
8 disabled. If not, proceed to step two.

9 Step two: Does the claimant have a "severe" impairment?
10 If so, proceed to step three. If not, then a finding of not
11 disabled is appropriate.

12 Step three: Does the claimant's impairment or
13 combination of impairments meet or equal an impairment
14 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
15 so, the claimant is automatically determined disabled. If
16 not, proceed to step four.

17 Step four: Is the claimant capable of performing his
18 past work? If so, the claimant is not disabled. If not,
19 proceed to step five.

20 Step five: Does the claimant have the residual
21 functional capacity to perform any other work? If so, the
22 claimant is not disabled. If not, the claimant is disabled.

23 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
24 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
25 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
26 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
27 "not disabled" at any step, there is no need to complete further
28 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

Claimants have the burden of proof at steps one through four,
subject to the presumption that Social Security hearings are non-
adversarial, and to the Commissioner's affirmative duty to assist
claimants in fully developing the record even if they are represented
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a prima facie case of disability is
made, and the burden shifts to the Commissioner (at step five) to

1 prove that, considering residual functional capacity ("RFC")², age,
 2 education, and work experience, a claimant can perform other work
 3 which is available in significant numbers. Tackett, 180 F.3d at 1098,
 4 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

5 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

6 Here, the ALJ found that plaintiff had not engaged in substantial
 7 gainful activity since her alleged disability onset date (step one);
 8 that plaintiff had "severe" impairments, namely a history of a
 9 cerebrovascular accident, hypertension, a history of heart disease,
 10 rheumatoid arthritis, a history of cellulitis, low back pain, and
 11 asthma, as well as a "non-severe" mental impairment (step two); and
 12 that plaintiff did not have an impairment or combination of
 13 impairments that met or equaled a "listing" (step three). [AR 19,
 14 20.] Plaintiff was found to have an RFC for work at the medium
 15 exertional level. [AR 21.] The vocational expert testified that
 16 plaintiff's past relevant work as an administrative assistant and
 17 clerical worker were performed at the sedentary exertional level. [AR
 18 258.] The ALJ found that plaintiff's RFC did not preclude her from
 19 returning to her past relevant work (step four) and, thus, she was not
 20 "disabled" as defined by the Social Security Act. [AR 23.]

23
 24 ² Residual functional capacity measures what a claimant can
 25 still do despite existing "exertional" (strength-related) and
 26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
 27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
 28 work without directly limiting strength, and include mental, sensory,
 postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
 nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 **C. ISSUES IN DISPUTE**

2 The parties' Joint Stipulation presents three disputed issues:

- 3 1. Whether the ALJ erred in failing to consider plaintiff's
4 non-severe mental impairment in his residual functional
5 capacity assessment;
- 6 2. Whether the ALJ failed to properly consider plaintiff's
7 obesity; and
- 8 3. Whether the ALJ provided clear and convincing reasons to
9 reject plaintiff's subjective symptom testimony.

10 [JS 3-4, 8, 14.]

11 As discussed below, Issue Two is dispositive.

12 **D. PLAINTIFF'S OBESITY**

13 According to the record, plaintiff is five feet four inches tall,
14 with a most recent weight of 218 pounds. [AR 206.] Plaintiff reported
15 gaining thirty pounds since a stroke she suffered in October 2003.³
16 [AR 212.] She further complained of constant lower back pain. [AR
17 204.] In the administrative decision, no mention was made of
18 plaintiff's weight or its possible interactive effect on her other
19 impairments. Plaintiff argues that this was reversible error.

20 Although the Commissioner removed obesity from the Listing of
21 Impairments in 1999, the condition may still factor into a multiple
22 impairments analysis by virtue of its interactive effect on a
23 plaintiff's other impairments. 64 Fed. Reg. 46122-01, 1999 WL 637689;

24 ³ The record shows that plaintiff's weight has been gradually
25 increasing from 185.6 pounds (July 2001), to 204 pounds (November
26 2003), 208 pounds (December 2003), 210 pounds (December 2003), 216
27 pounds (April 2004), and 218 pounds (April 2005). [AR 141, 144, 145,
28 146, 160, 206.] At her most recent weight of 218 pounds, plaintiff
 has a body mass index ("BMI") of 37.4, which is considered "Level II"
 obesity by the Clinical Guidelines of the National Institutes of
 Health. Social Security Ruling ("SSR") 02-1p, 2000 WL 628049 at *2.

1 Celaya v. Halter, 332 F.3d 1177, 1181 (9th Cir. 2003). In Celaya, the
2 Ninth Circuit held that a consideration of the plaintiff's obesity in
3 this context was necessary, even if the plaintiff did not explicitly
4 allege obesity, for three reasons: (1) obesity was raised implicitly
5 in the plaintiff's report of symptoms, (2) the record indicated that
6 the plaintiff's obesity was close to the listing criterion, and was a
7 condition that could exacerbate her reported illnesses; and (3)
8 plaintiff's pro se status, as well as the ALJ's observation of
9 plaintiff and information in the record should have alerted to the
10 need to develop the record with respect to her obesity. Celaya, 332
11 F.3d at 1182; but see Burch v. Barnhart, 400 F.3d 676, 682 (9th Cir.
12 2005)(declining to require an interactive analysis when the record did
13 not indicate obesity exacerbated plaintiff's other impairments and,
14 "[m]ore significantly, [plaintiff] was represented by counsel"). Such
15 an analysis would entail, in part, an assessment of the effect of
16 obesity upon a plaintiff's ability to perform necessary physical
17 activity within the work environment and the ability to sustain
18 function on a regular and continuing basis. SSR 02-1p, 2000 WL 628049
19 at *6.

20 Here, the record establishes that plaintiff's obesity should have
21 been included in a multiple impairments analysis, even though
22 plaintiff did not explicitly raise the condition as a disabling
23 factor. The issue of plaintiff's obesity was raised implicitly in
24 plaintiff's report of symptoms, particularly her lower back pain and
25 her steady weight gain following her stroke. Moreover, it was a
26 condition that could have exacerbated plaintiff's reported illnesses,
27 which includes rheumatoid arthritis, hypertension, a history of heart
28 disease, and low back pain. See Celaya, 332 F.3d at 1182 (requiring

1 an interactive analysis "[g]iven the potential effect of obesity" on
2 plaintiff's diabetes and hypertension); cf. Burch, 400 F.3d at 682
3 (not requiring analysis when there was little evidence plaintiff's
4 obesity exacerbated her status post mastectomy or other conditions).
5 Most importantly, plaintiff was unrepresented at the hearing,
6 increasing the ALJ's duty to develop the record with respect to
7 plaintiff's obesity to assure that her interests were represented.
8 See Celaya, 332 F.3d at 1183 (reversing when unrepresented plaintiff
9 "very likely never knew that she could assert obesity as a partial
10 basis for disability"); Burch, 400 F.3d at 682 (distinguishing Celaya
11 when, "significantly," plaintiff was represented by counsel); see also
12 Higbee v. Sullivan, 975 F.2d 558, 561 (9th Cir. 1992) (discussing the
13 heightened duty of an ALJ toward a pro se plaintiff). Under these
14 circumstances, a multiple impairments analysis that explicitly
15 accounts for the direct and marginal effects of plaintiff's obesity is
16 required.

17 **E. REMAND FOR FURTHER PROCEEDINGS**

18 The decision whether to remand for further proceedings is within
19 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
20 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
21 further proceedings, or where the record has been fully developed, it
22 is appropriate to exercise this discretion to direct an immediate
23 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
24 remand for further proceedings turns upon their likely utility).
25 However, where there are outstanding issues that must be resolved
26 before a determination can be made, and it is not clear from the
27 record that the ALJ would be required to find the claimant disabled if
28 all the evidence were properly evaluated, remand is appropriate. Id.

1 Here, as set out above in Issue Two, outstanding issues remain before
2 a finding of disability can be made. Accordingly, remand is
3 appropriate.

4 **VI. ORDERS**

5 Accordingly, **IT IS ORDERED** that:

6 1. The decision of the Commissioner is **REVERSED**.

7 2. This action is **REMANDED** to defendant, pursuant to Sentence
8 Four of 42 U.S.C. § 405(g), for further proceedings as discussed
9 above.

10 3. The Clerk of the Court shall serve this Decision and Order
11 and the Judgment herein on all parties or counsel.

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13 DATED: August 28, 2007

14 _____/S/_____
15 CARLA M. WOEHRLE
16 United States Magistrate Judge
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